

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

74-2328

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P/S

74-2462, 2463, 2464

IN THE
United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Respondent,

vs.

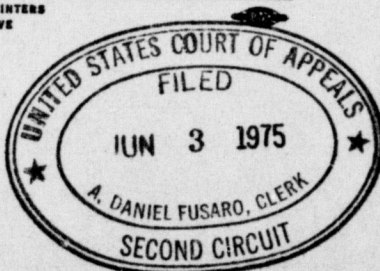
HARRY BERNSTEIN, ROSE BERNSTEIN and
EASTERN SERVICE CORPORATION,
Defendants-Appellants.

**REPLY BRIEF OF APPELLANTS HARRY
BERNSTEIN, ROSE BERNSTEIN AND
EASTERN SERVICE CORPORATION**

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UNITED STATES OF AMERICA,

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vs.

HARRY BERNSTEIN, ROSE BERNSTEIN and

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Defendants-Appellants.

**REPLY BRIEF OF APPELLANTS HARRY
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Statement

Consistent with their approach to this case from the date of the filing of 13 indictments against these defendants, involving hundreds of counts and thousands of items, to the end of the nine-months trial, government counsel have now (seven days late) served us with page proof consisting of 162 pages of "brief" and several more pages of what they happily describe as an "Addendum." Many, if not all, of the things which made a manageable trial impossible, to the

defendant's prejudice, now make an appellate review most difficult. Since a reply brief is hardly the place to attempt to restate the minutia of the factual background of the case, even in the light of many errors contained in the statement of facts in the government's brief, we proceed directly to argument.

Replying to Appellee's Point I

The indictment was insufficient with respect to the false statement counts.

The government, under its Point I, attempts in a general way and throughout a diffuse discussion to answer our Point IV (a) at pp. 43 *et seq.* of our main brief, but does not come to grips with our argument that the indictment is defective with respect to each of the false statement counts for failure to specify what statements, among a great many contained in the applications for insurance, are claimed by the government and were found by the Grand Jury to have been false. The government contends at pp. 49 *et seq.* of its brief that it was sufficient for the indictment to identify "the particular *document* involved."* It is the failure to allege what *statements* in the "document" the Grand Jury considered false that we are arguing about. An examination of the illustrative application blanks bound up in Volume VI of our Appendix at C 1129 shows that there are scores of statements in each of the "documents". The indictment in the form in which it was returned was, as we pointed out in our main brief, "*open ended*" and months later, indeed almost a year later, the *government*, not the grand jury, sought to supply the de-

* A whole package of papers was involved in each instance (C 471).

fect by a bill of particulars, reserving the right to "offer evidence of additional false statements at the trial"* , appellants' brief p. 47 and record references there cited.

The government, although citing a host of irrelevant cases, cites no case in support of its position and finally "tosses in the towel" with the lament at p. 53 of its brief that its research has disclosed no case in which the question we raise was involved. In this connection we do not quite understand why the government should cite *United States v. Leach*, 427 F. 2d 1107, a case involving a violation of section 1010, with the statement that the First Circuit in that case "gave no indication that specification of the false statement was a requirement of a valid indictment." The question here presented was not there involved because the indictment in the *Leach* case specified the alleged false statement. The indictment in that case charged the defendant with "stating in the loan application that the proceeds would be used to improve the property, knowing such representation to be false." This is exactly the type of allegation which was required but lacking in our case. The indictment in the *Leach* case, like the Department of Justice's own guide lines and standards in this area, exemplified the minimum that should be met in an indictment charging false statements. See addendum A to our main brief.

The case of the *United States v. Alo*, 439 F. 2d 451 (2d Cir. 1951) resorted to by the government at p. 54 of its brief is unavailing as any support for the government's claim that a specification of the false statements was not

* The prosecutor was attempting to supply the missing element of the charge and to reserve the "right" to add to the charge. Only the grand jury could make the charge.

required to be made in the indictment. In that case the false statements, or rather the evasive statements charged, were identified as those given by the defendant in testimony at a stated time and place. In other words, the false statements were specified.

The indictment is insufficient with respect to each of the false statement counts for the additional reason that it fails to allege the essential element of knowledge on the part of the defendants charged that the statements were false.

This proposition has been definitely settled by this court's decision in *United States v. Berlin*, 472 F. 2d 1002 (2d Cir. 1973). That was a case on all fours with the case at bar. It involved the same statute and was argued in this court in behalf of the government by one of the same counsel who tried this case for the government. Interesting and important, too, is the fact that this court's decision in the *Berlin* case was handed down on January 20, 1973, eight months before the trial of this case. Months and months of court time could have been saved and much prejudice to the defendants on the other counts avoided in our case by a graceful acquiescence by government counsel in the decision of this court in the *Berlin* case which stated:

"An essential element of a violation of either statutory provision is that the offender had *knowledge* of the falsity of the statement that was made." (italics ours)

We resist the temptation to quote further from this controlling decision. We know that the court will reread it. See, also, our main brief, pp. 51-53.

A dismissal of the false statement counts, of course, obviates the necessity of an analysis of the Court's charge on the subject of the false statement counts and a consideration

of our Point III in our main brief that the Court's charge on the subject was fraught with reversible error. Nevertheless, and in the interest of thoroughness, we pass briefly to such subject.

**Replying to Appellee's Attempt to Uphold the
District Court's Charge with respect
to the False Statement Counts**

We preface further discussion of the Court's charge with respect to these counts with the following quotation from the appellee's brief at page 114:

"Knowledge is an essential element in the crime of submitting a false statement in violation of 18 U.S.C. § 1010. *United States v. Leach, supra*, 427 F. 2d at 1111. The government did not contend that appellants Harry Bernstein, Florence Behar, or Eastern Service Corporation had actual knowledge of the falsity of any particular statement in the applications for mortgage insurance."

This admission should settle once and for all the proposition that neither the defendant Harry Bernstein nor the defendant Eastern Service Corporation* had actual knowledge of the falsity of any statements in the various applications for mortgage insurance. Relying upon the unqualified admission, we refrain from marshaling the facts to show that neither Mr. Bernstein nor Eastern Service Corporation had actual knowledge of the falsity of any statements in the applications for mortgage insurance.

The government's discussion of recklessness like its claimed statement of facts, proceeds as if the statements under discussion were those of Eastern Service Corporation instead of those of various mortgagors. The govern-

* Nor for that matter the defendant Florence Behar.

ment's discussion also proceeds on the assumption that there was some affirmative duty on the part of Eastern Service Corporation to investigate and "insure" the truth of the statements* and, as if there were a duty on the part of Eastern Service Corporation to use good "credit judgment". Neither was the case.

There is no document of any kind or character or rule of law creating any affirmative duty on the part of Mr. Bernstein or Eastern Service Corporation. For us to argue, in the absence of some showing, of the existence and claimed source of such an affirmative duty is but to labor the point which we made under Point III of our main brief, pp. 27, *et seq.*

The government makes little or no attempt to uphold that portion of the Court's charge which refers to the element of "proper credit judgment", and erroneously equates a failure to use proper credit judgment somehow or other with false statements (see our main brief, pp. 30, 40). And little could it! *The court gave the jury no standard by which to determine proper credit judgment.* As we argued in our main brief, what in the world would constitute "proper credit judgment" with respect to unfortunate people living on relief in slum areas. Few of them would be expected to have any credit standing and an application of any conventional or known standard of credit would defeat the purpose of the National Housing Act. In this connection, we respectfully request the court to read the remarks of the Assistant Secretary Commissioner of FHA (C 1164-1178). At C 1166, the Secretary talked about the FHA duty

* Even if there had been some duty to investigate what more than the employment of the most prestigious credit reporting agency to check the credit information was required? What further investigation could Eastern make? What would constitute recklessness? The jury was in no wise instructed on the subject.

to insure "especially in the slums and blighted portions of the inner city." At C 1172, he stated that he wanted FHA personnel "to go looking for applications." At C 1175, he said that "We must be willing to take the risks necessary to accomplish the urgent job" and that "there are more risks inherent in achieving this kind of urgent *social purpose*, than in the insurance of loans on suburban subdivision." Further on the subject of risks, the Secretary said, "risks are inherent in an insurance program (otherwise there would be no justification or need for insurance)" (C 1175). He further stated that a project "should not be rejected simply because it involves poor people" (C 1176).

We repeat, the Court equated the failure to exercise "proper credit judgment" by Eastern Service Corporation and Harry Bernstein with the making of false statements (21618, C 709).^{*} The Court left it to the jury to determine as a question of fact whether such an affirmative duty rested on the Bernsteins and Eastern Service Corporation. As we have said, nowhere did the Secretary or the Court give any indication of what constituted proper credit judgment in the circumstances of this case, or otherwise. From the Secretary's statements, it is clear that the overriding consideration, so far as the FHA was concerned, was the *social* and not the financial objective to be achieved by mortgage insurance. Again, and with an apology for repetition, we repeat that the exercise of credit judgment was for the FHA

^{*} Amusing, if the situation were not so serious, is the statement at p. 121 of appellee's 16^o-page, two and one-half pound brief (in the form of page proof from which we are working seven days after the time limited for service of appellee's brief) that considerations of time and space in its tome prevent appellee from pointing out why its counsel believes that the Court did not "equate" lack of proper credit judgment with false statements. We cannot make the fact of the Court's so doing any clearer than the Court's language quoted in our main brief at pp. 30 *et seq.*

and not for Eastern Service Corporation. Furthermore, the FHA was better indoctrinated with respect to the social objectives to be achieved than was Eastern Service Corporation. It was and is preposterous to fine* and imprison an old couple for a failure to meet a lay jury's undisclosed concept of proper credit judgment in the circumstances of this mismanaged case.

Appellee's Argument at Pages 123 and 124 of its Brief

Unable to uphold the Court's charge on the subject of the "false statement counts" or refute the arguments under Point III at pp. 30-32 of our main brief that the question of whether the defendants Bernstein and Eastern Service Corporation had any affirmative duty was clearly a question of law, not one of fact, and that the Court plainly erred in submitting such question to the jury as a question of fact, the Government, in defiance of the record, claims some ambivalence on the part of defendants' trial counsel with respect to defendants' position on the subject. There is not the slightest basis for such a claim. Defendants' trial counsel first, last, always and throughout, contended that this question was one of law and not of fact. Quoting from the same record references cited by the Government, it appears that at 18918 one of the defendant's trial counsel said, "First, let me say that any affirmative duty to investigate, or whatever it is, is in our view a legal issue rather than one that should be phrased for the jury to decide." At 18932 trial counsel said, "The question of affirmative duty is obviously an affirmative legal duty, and it seems to me that the legal duty is to be determined solely by the Court and not by the jury." The Court, at the same page,

* let alone excessively.

then said, "That is right." At 18941 trial counsel for Eastern Service Corporation urged that the question was one of law, not of fact. At 18944 trial counsel for the government said, "The Government is prepared to agree with defense counsel, since that is their wish, that the question of whether or not the affirmative duty exists does not have to be submitted to the jury."

After admitting the foregoing, and at page 123 of its brief, the government makes the astounding misstatement. "In any event it is clear that defense counsel did request the Court to submit the question of an affirmative duty to the jury as a question of fact rather than charging it as a matter of law." At 19069, the record reference cited in connection with this unfortunate misstatement, one of the defendant's trial counsel said, "I have to say, Judge, that I think if it is decided that you want to leave it to the jury to decide the question of duty, we think it is wrong for you to make that decision." At 19129 trial counsel for Eastern Service Corporation said, "So that my position, if no one else's position, is crystal clear, to use the word, I said to the Court that I thought the existence of or lack of existence was a matter of law which must necessarily be determined in the first instance by the Court." At 19136 one of the defendants' trial counsel tried without success to ascertain what the Court was going to charge on the subject. Defense counsel were entitled to know but could not find out.

There the matter rested until counsel for Dun & Bradstreet, during a recess in the course of his summation, said to the Court, "I was wondering whether the Court this morning is in any better position to advise us with respect to what the decision will be with respect to that topic (any affirmative duty)." (Trial counsel for our defendants summed up without knowing.) At 19772, during the course

of a colloquy occasioned by the foregoing inquiry on the part of counsel for Dun & Bradstreet, one of the other trial counsel urged again, "It is a question of law which should be charged to the jury." At 19772, *et seq.* all trial counsel joined in the position that there was no affirmative duty on the part of Eastern Service Corporation with respect to the alleged false statements. How counsel for the Government could summon up the hardihood to make the unworthy misstatement at the top of page 124 of appellee's brief to the effect that defendants' trial counsel left the trial court with a misimpression as to their position on this important subject at the trial, is incomprehensible to us.* If there could be said to be any doubt, it was certainly made clear by the defendants' objections to the Court's charge at 21521-2, C 609-10, 21538, C 626, 21541, C 628. As we pointed out in our main brief at pages 39-41, extended colloquies took place apropos of defendants' objections and the situation was further aggravated by the Court's charge, 21614, C 709, to which additional objections were taken by all the defendants, 21622-3, C 713-14.

This court, speaking through Judge Friendly, in *United States v. Guterma*, 281 F. 2d 742, 751-2 (2d Cir. 1960), made it clear that when the court leaves to the jury the interpretation of a Federal agency's regulation, a conviction must be reversed. Judge Friendly said,

"In doing this the judge gave the jury a task properly his own, namely, the interpretation of the term 'net book value' in SEC Instruction 4 as applied to a pledge of securities. The conviction on Count 9 must therefore be reversed in any event; . . ."

See also discussion at pages 35 *et seq.* of our main brief.

The Court's error in our case, and its consequential prejudice could not be plainer.

* We believe that it behooves counsel to withdraw this statement.

Replying to Appellee's Point II with respect to the Conspiracy Charge

The Court did little more than read the conspiracy statute and without sufficient guidance left it to the jury to say whether it had been violated. This is insufficient under the decisions of every case on the subject.

This court has concerned itself so often and so carefully with the matter of multiple conspiracies as against a single conspiracy charge that we leave it to the court without extended argument on our part to deal with this subject in this strange case.* We can't resist an observation that the government proceeds as if "anything goes" in a charge, so long as the charge was made before the warning of this court in *United States v. Sperling*, 506 F. 2d 1323. In this connection, as this court knows better than we do, unavailing protests of this and other courts against the misuse of the conspiracy charge were from time to time made long before the Sperling decision. The Court's charge with respect to the conspiracy count was remarkable in that the contentions of the parties (certainly those of the defendants) were never mentioned. As we have pointed out in our main brief, the evidence was not marshaled nor was the jury's attention focused on the facts and findings that would have to be made in order to convict the defendants under this count.

The esoteric, indeed arcane, subject of the existence of one conspiracy versus two or more was not even attempted to be explained. The diagram at page 63 of the government's brief seems to suggest that only a juror versed in higher mathematics and up-to-date in his ability to solve

* We will rest principally on our main brief on this phase of the case.

theorems of geometry would be expected to understand what the government is talking about as its counsel go around in circles.

Whatever else may be said about the Court's charge on the subject of the alleged conspiracy, one of the most obvious errors affecting Mr. and Mrs. Bernstein and Eastern Service Corporation and requiring a reversal was the Court's failure to distinguish between the scienter component of a conspiracy charge and that of substantive charges. "*Actual knowledge*" of the falsity must be found beyond a reasonable doubt in the case of a conspiracy to make false statements.* As stated by Chief Judge Kaufman in *United States v. DeMarco*, 488 F. 2d 828, 832 (2d Cir. 1973):

"The distinction between the scienter component of the conspiracy and substantive charges arises from the notion that although an individual may commit some crimes unwittingly, he cannot conspire to commit a specific crime unless he is aware of all the elements of the crime. In Learned Hand's classic phrase,

"'While one may, for instance, be guilty of running past a traffic light of whose existence one is ignorant, one cannot be guilty of conspiring to run past such a light, for one cannot agree to run past a light unless one supposes that there is a light to run past.'

"*United States v. Crimmins*, 123 F. 2d 271, 273 (2d Cir. 1941)."

This court in *DeMarco* reversed on its own motion on the ground of *plain error*.

See, also, *United States v. Fields*, 466 F. 2d 119, 120 (2d Cir. 1972), where this court said:

* In our case "actual knowledge" was required under all of the substantive false statement counts as well.

"This charge on an essential element of the crime—a defendant's knowledge that the goods were stolen—was inadequate and misleading. Contrary to the judge's instructions, the Government did have to prove that the defendants '*actually knew*' that the beef was stolen property. See *United States v. Mas-sarotti*, 462 F. 2d 1328 (2d Cir. 1972); *United States v. Nitti*, 444 F. 2d 1056, 1059 (7th Cir. 1971)." (*italics ours*)

Since the preparation of our main brief, the Supreme Court has decided *United States v. Feola*, ____ US ____, 43 L. Ed. 2d 541 (after all these years) criticizing the general application of the *Crimmins* rule and Judge Hand's analogy, but our case falls well within the exception mentioned in *Feola*. The law is still clear, that one does not become a conspirator through negligence or even recklessness. As observed by the Supreme Court, this Circuit has consistently followed and applied Judge Hand's analogy. See, e.g., *United States v. Vilhotti*, 452 F. 2d 1186, 1190 (CA2 1971), *cert. denied*, 406 US 947, 32 L. Ed. 2d 335, 92 S. Ct. 2051 (1972) and *sub nom. Maloney v. United States*, 405 US 1041, 31 L. Ed. 2d 582, 92 S. Ct. 1314 (1972), *United States v. Sherman*, 171 F. 2d 619, 623-624 (CA2 1948), *cert. denied, sub nom. Grimaldi v. United States* and *Whelan v. United States*, 337 US 931, 93 L. Ed. 1738, 69 S. Ct. 1484 (1949).

It must be remembered that in our case it has been unequivocally conceded that "The government did not contend that appellants Harry Bernstein, Florence Behar or Eastern Service Corporation had *actual knowledge* of the falsity of any particular statement in the applications for mortgage insurance" (appellee's brief, p. 114).

See also government's statement at 18818 "We agree that for this case the law will be that recklessness is not sufficient in the conspiracy count." (There must be integrity to a judicial admission.)

A reading of this court's opinion in the *DeMarco* and *Fields* cases, *supra*, together with the government's concession just quoted, against the facts and the Court's charge in this case should effectively dispose of the conspiracy count. It should be reversed and dismissed.

We cannot leave the subject of conspiracy without recalling that those of us who have had occasion to participate in mass conspiracy trials over the past many years have often claimed that prosecutors resort to the broad sweep of a conspiracy charge because they believe that such a sinister sounding count in an indictment relaxes the rules of evidence and makes it easier to convict defendants on substantive counts contained in the same indictment. Our claims in this regard have been piously answered by arguments that prosecutorial efficiency, together with the saving of court time and expense justify this procedure.* At last we have the startling and disquieting admission, not from a prosecutor, but worse, from a trial judge who could find no evidence (not even a "*smidgeon*") to support a conspiracy charge as to certain defendants that he, nevertheless, submitted the charge to the jury against such defendants for the jury's consideration because without such a charge it would be "more difficult" to convict on the substantive counts (C 1122-1124).** After the jury disagreed as to all counts against the defendants Dun & Bradstreet and its office manager Prescott, the

* How the jumbling of several alleged and unrelated claimed conspiracies, together with a multiplicity of different categories of alleged substantive counts with a great number of counts within each category in the indictment in the case at bar, resulting in a nine and one-half months trial, can be justified on the grounds of efficiency and the saving of court time escapes us.

** Perhaps we would have been better advised to call attention to this statement under our recusal point because it certainly reveals the District Judge's continuing "bent of mind."

Court entered a judgment of acquittal with respect to all charges, including the conspiracy charge, against these two defendants and in doing so, the Court stated:

"I don't mind saying that *I was personally disappointed* in count one insofar as Prescott and Dun & Bradstreet were concerned, *because I didn't think there was very much to the conspiracy count.*

"But I felt that in view of your tremendous amount of work and the evidence that you produced, that there might be that *smidgeon* that I did not foresee at any time.

"But upon retrospect, I would say that insofar as count one was concerned, I could have directed a verdict of acquittal as easily as I let it go to the jury, which leaves the substantive count, which, of course, *makes a lot more difficult for the Government to sustain their evidence on the substantive count.*

"I felt very strongly I could have granted a motion for acquittal then, and I shall do so now against Prescott and Dun & Bradstreet.

"[Government Counsel]: Is that on both the conspiracy count and substantive?"

"The Court: On the whole indictment, on the whole indictment. . . ." (C 1122-124)

While the judge was referring more particularly to Dun & Bradstreet and its office manager Prescott, the defendants Bernstein and Eastern were prejudiced because weeks and months of testimony on the Dun & Bradstreet, Prescott

* Rhetorically, we ask, why should an impartial judge be "*personally disappointed* in count one . . ." and further, why shouldn't the Court dismiss this conspiracy charge if, after nine months of trial, he couldn't see even a "*smidgeon*" of evidence to uphold it? His statement is cumulative evidence that he thought that any stick was one good enough with which to club the defendants who he had announced were guilty before he heard a word of testimony. See our main brief, Point I.

segment of the case would have been eliminated if the judge had done what he should have done and what, in effect, he seems to admit he should have done, *i.e.*, dismiss the conspiracy count as to Dun & Bradstreet and Prescott. Equally clear it is that he should have dismissed it as to all defendants. Who can say that the Bernsteins and Eastern were not unlawfully prejudiced by the Court's failure to dismiss as to Dun & Bradstreet and Prescott. See *United States v. Roach*, 321 F. 2d 1 (1963).

The Misjoinder of Counts and Defendants

The government has no persuasive answer to our claim that offenses and defendants were improperly joined. As we argued at p. 76 of our main brief, offenses may be joined if they are of the same or similar character or based on the same act or transaction, etc. Certainly the so-called bribery counts involving the ambidextrous Goodwin who both gave and received bribes over many years in situations unrelated to the defendants were not the same or of similar character to the so-called false statement counts. The joinder cannot be justified on the ground that they constituted acts or transactions connected together as parts of a common scheme or plan. Especially is this true because the conspiracy count must be dismissed for the reasons argued, *supra* and in our main brief, pp. 76-77.

This case confirms this court's doubts expressed in its opinion in *United States v. Miley*, ____ F 2d ____ (2d Cir. 1975), where this court said:

"Absent the conspiracy count, *we doubt that the joinder requirements of Fed. R. Crim. P. 8(b) could be met*, since not all the appellants were otherwise 'alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses' (Italics ours.) (Citing cases.)"

Replying to Appellee's Point III

Under Point III of its brief appellee understandably but futilely disclaims "prosecutorial mismanagement."

Without regard to labels or recriminations—call it prosecutorial mismanagement or something else—the stubborn fact persists that the case as conceived, structured and tried made it impossible to defend. If an examination of the record, the exhibits,* the incidents of the trial** and the Court's three-day charge does not avail to demonstrate the unmanageable character of the case and the resulting unfairness to the defendants, an extended argument on our part cannot be expected to do so.

We do not contend that there is some rule of constitutional or other law limiting *per se* the length of a trial. We do not claim that some arbitrary legal limit can or should be imposed upon the number of defendants to be tried at one time but we do claim that in the circumstances of this case the defendants we represent were unlawfully prejudiced by the insistence of the prosecution upon an unwarranted overkill. This case involved a vindictive out-and-out effort to pile penalty after penalty upon the defendants. The fines imposed aggregate \$685,000 to say nothing of the harsh prison sentences.

* Millions of papers.

** After the trial had been proceeding for many months the defendant Harry Bernstein, who had a cardiac history, was stricken with an attack and thereafter was unable to attend for many weeks. Motions to sever in his behalf were made (15839-16055). He was examined by a court-appointed doctor who concurred with Mr. Bernstein's physician that the strain of the trial, especially the giving of testimony, would endanger his life. The motion to sever was denied and applications for mandamus refused. We ask the court to examine the record with respect to this happening at 15839-16055.

The government cites *United States v. Dardi*, 330 F. 2d 329, noting that this court upheld the conviction there because the financial scheme involved was of such magnitude that a long trial was inevitable. Nothing like that accounts for the length of our trial. The nine months trial was occasioned wholly and solely by a misjoinder of defendants and of charges together with a host of substantive offenses within the various categories of crimes charged and improperly joined for trial. Simple and separate trials of the defendants we represent on either four or five of the so-called misstatement counts on a legally sufficient indictment or on a similar number of the bribery counts could have expeditiously determined the question of guilt or innocence.* Instead of so proceeding, counsel for the government proceeded as the record discloses.

The government states at p. 80 of its brief,

"The key determination, therefore, is whether it is within the jury's capacity, given the complexity of this case, to follow admonitory instructions, and to keep separate, collate and appraise the evidence relevant only to each defendant."**

In this connection we call attention to the District Court's statement at 21185, referring to the false statement counts,

"If anyone can possibly remember those zeroed in statements I think is hard to believe."

and his statement that his charge was a "very difficult and hard to understand charge" (21452, C 539). It sure was to us.

* In much less than nine and one-half months.

** If the members of this court really believe the jury in this case could and did this then this point is without merit.

The District Court crowned its undistinguished contribution to the deplorable record of mismanagement of this case and evidenced his prejudice by telling the jury "You do not have to remember all those numbers, because the memorandum of verdict which I will be giving you will be of help." (21467, C 554). He later gave the jury what he first called "your memorandum of *guilty* verdict" (Court's Ex. 24, C 1011-1078, 21498, C 586). This was given to the same jury before which he made the vulgar statement that the letters "B.S." was proper designation for the defendants' exhibits.

Replying to Appellee's Point XII

Although our contention that the District Judge should have recused himself was discussed under Point I of our main brief and notwithstanding the fact that a decision by this court that he should have so disqualified himself would obviate a consideration of most of the other points raised,* government counsel attempt to answer our point under Point XII (the last point) of their brief. Evidently government counsel hope that this important point will become lost in the shuffle. This is probably good lawyering, but if such is their hope it should be a futile one.

It is a point which we find distasteful and unpleasant to argue, but one of compelling and controlling merit which requires us in the performance of our duty to our clients to continue to urge.** However, there is no necessity to labor the point.

* Indeed, all of the points except those attacking the sufficiency of the indictment with respect to the so-called false statement counts.

** Incidentally we believe we are more restrained in our quest for justice for our clients than was the district judge in his gratuitous and unjustified remarks concerning the Southern District Court (B 495).

Either the repeated statements of a District Judge in advance of trial that he is "sure" of the defendants' guilt (8329) and equally sure that the defendants' "terrible scheme" has cost the taxpayers hundreds of millions of dollars (8280) are grounds for disqualification, or they are not. Either this court's decision in *Winters v. Travia*, 495 F. 2d 839, 842 applies, or it does not,

"Important as it was that people should get justice, it was even more important that they should be made to feel and see that they are getting it."

See our main brief, pp. 22 *et seq.*

The government's suggestion that, because a petition for writ of mandamus was denied without opinion by this court, the question has been concluded is entirely without merit. See Rule 21, Rules of Appellate Procedure.

In *Dubnoff v. Goldstein*, 385 F. 2d 717, 721 (2d Cir. 1967) (panel: Waterman, Smith and Levet), the court stated:

"Determination of a District Judge not to disqualify himself is ordinarily reviewable only upon appeal from a final decision on the cause in which the application by affidavit was filed. (Citing cases)."

In *Albert v. United States District Court for the Western District of Michigan*, 283 F. 2d 61 (6th Cir. 1960), the court stated:

"The order entered by the District Judge refusing to disqualify himself is not reviewable upon appeal until a final judgment has been entered in the case. *Collier v. Picard*, 6 Cir. 1956, 237 F. 2d 234."

See, also, *Green v. Murphy*, 259 F. 2d 591.

The affidavit requesting disqualification was in all respects sufficient. See our main brief, pp. 14 *et seq.* We are confused by the government's statement at p. 160 of its

brief that the District Court "also passed on the truth of the allegations and found that no personal bias or prejudice in fact existed." This is just what the cases say that he should not do and could not lawfully do. See our main brief, Point I.

We believe that an examination of the record will show that during all of the pre-trial proceedings in this and related cases, the District Judge assumed the stance of a prosecutor and revealed his prejudice at every juncture. See, Vol. I of Appendix.

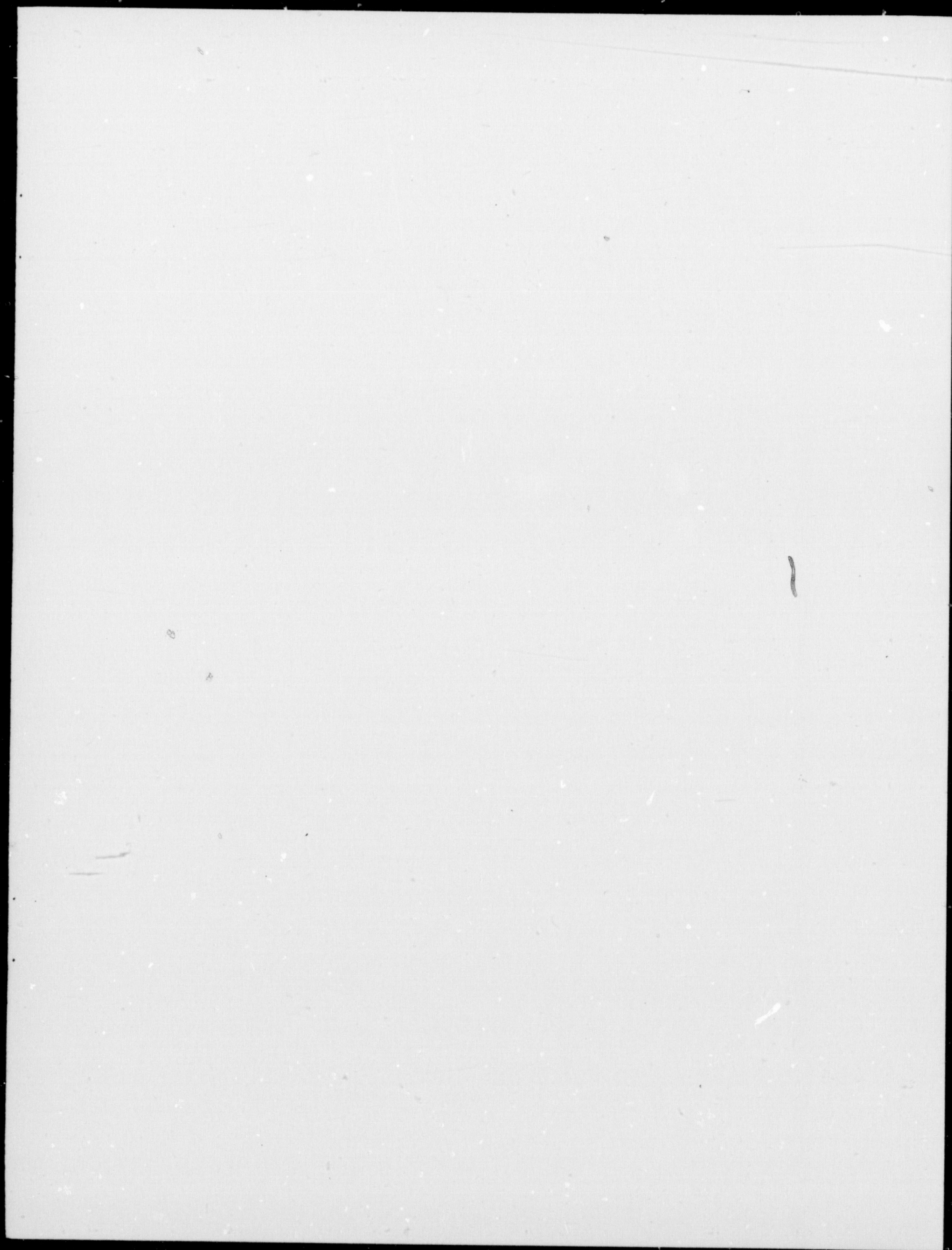
Conclusion

We join in the points and arguments of counsel for the other appellants to the extent that they apply to our defendants, and for all the reasons stated in our main brief and this reply brief we urge that the judgments of conviction against Harry Bernstein, Rose Bernstein and Eastern Service Corporation be reversed.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

State of New York) RE: U. S. A.
County of Genesee) ss.: v
City of Batavia) Harry Bernstein
Docket Nos. 74-2462, 74-2463 & 74-2464

I, Leslie R. Johnson being
duly sworn, say: I am over eighteen years of age
and an employee of the Batavia Times Publishing
Company, Batavia, New York.

On the 2 day of June, 1975
I mailed 3 copies of a printed Brief in
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New York, New York 10007

at the First Class Post Office in Batavia, New
York. The package was mailed Special Delivery at
about 4:00 P.M. on said date at the request of:

Frank G. Raichle, Esq.

10 Lafayette Square, Buffalo, New York 14203

Leslie R. Johnson

Sworn to before me this

2 day of June, 1975

Monica Shaw

MONICA SHAW
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 1977